THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 705/2018

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS GAUTENG LOCAL DIVISION, JOHANNESBURG **APPELLANT**

and

PULE ANDREW RAMOLEFI **RESPONDENT**

Neutral citation: *DPP, Gauteng v Ramolefi* (705/2018) [2019] ZASCA 90 (3 June 2019)

Coram: Majiedt and Van Der Merwe JJA and Gorven AJA

Heard: 28 May 2019

Delivered: 3 June 2019

Summary: Criminal Procedure – Sentence – appeal by State against a sentence imposed on appeal to the high court – lack of jurisdiction to determine such an appeal – appeal struck from the roll.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Molahlehi and Van Der Linde JJ sitting as court of appeal):
The appeal is struck from the roll.

JUDGMENT

Gorven AJA (Majiedt and Van der Merwe JJA concurring):

[1] The State wishes to prosecute an appeal against sentence. The respondent was convicted on one count of murder, committed on 27 April 2013. The trial took place in the regional court for the regional division of South Gauteng, held at Alexandra (the trial court). He was sentenced to a period of 15 years' imprisonment. No substantial and compelling circumstances were found warranting a reduction of the minimum prescribed under the Criminal Law Amendment Act[1] (the CLAA). He sought leave to appeal against both his conviction and sentence. Leave was granted against sentence only. Molahlehi and Van Der Linde JJ, in the Gauteng Local Division of the High Court, Johannesburg, (the high court) upheld the appeal. They imposed a sentence of five years' imprisonment, wholly suspended for a period of five years on condition that the respondent is not found guilty of an offence committed during the period of suspension for which he is sentenced to a period of imprisonment without the option of a fine. The appellant (the State) was granted special leave to appeal the sentence imposed by the high court.

[1] Criminal Law Amendment Act 105 of 1997. The sentence falls under the provisions of s 51(2) read with Part II of Schedule 2 of the CLAA.

[2] Initially, no heads of argument were filed by the respondent. On the original day the matter was set down for hearing, counsel appeared on his behalf and moved for an adjournment. This was granted for a short period. In support of the adjournment it was indicated that the issue of the appealability of the order of the high court might arise. As a result, a request was made that both parties submit short heads of argument on the issue. It is this issue which must be dealt with initially, since it involves the jurisdiction of this court to hear the appeal.

'When a party raises a challenge to the jurisdiction of a court, this issue must necessarily be resolved before any other issues in the proceedings. The reason is simple. If the court has no jurisdiction, it is precluded from dealing with the merits of the matter brought to it.'[2]

[3] In *Director of Public Prosecutions v Olivier*,[3] this court held that it had no jurisdiction to determine an appeal against a sentence imposed by a high court sitting as a court of appeal. The State had only been granted a limited right of appeal against sentence in 1990. This was done by introducing ss 310A and 316B of the Criminal Procedure Act 51 of 1977 (the Act) by an amendment.[4] The section relevant to this matter, s 316B(1) of the Act reads:

'(1) Subject to subsection (2), the attorney-general may appeal to the Appellate Division against a sentence imposed upon an accused in a criminal case in a superior court.'

Dealing with s 316B(1), *Olivier* held:

'This subsection provides for appeals to this Court from a sentence imposed by a Superior Court. This does not mean a Superior Court sitting as a Court of appeal. It clearly means a Superior Court sitting as a Court of first instance.'[5]

The Constitutional Court agreed with *Olivier* in this regard.[6]

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[2] *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL* [2014] ZASCA 160; 2015 (1) SA 345 (SCA) para 50.
[3] *Director of Public Prosecutions v Olivier* [2005] ZASCA 121; 2006 (1) SACR 380 (SCA) para 22.
[4] These sections were inserted by s 11 of the Criminal Law Amendment Act 107 of 1990.
[5] *Olivier* para 15.
[6] *Nabolisa v S* [2013] ZACC 17; 2013 (2) SACR 221 (CC) para 81.

[4] *Olivier* was decided prior to the coming into effect of the Superior Courts Act (the SC Act).[7] After the SC Act came into effect, this court was confronted by the same question in *DPP Western Cape v Kock*.[8] In *Kock*, special leave to appeal was sought after an appeal to the high court against the sentence imposed by the regional magistrate had been brought by the State in terms of s 310A of the Act. This appeal to the high court was competent, but failed. Dissatisfied with the outcome, the State sought special leave to appeal the high court's order to this court. The application for special leave was based on s 16(1)*(b)* read with s 17(1)*(a)*(i) and (ii) of the SC Act. This court held that the SC Act has not altered the position:

'The limitation of the right of the state to appeal against both conviction and sentence is underpinned by constitutional and policy considerations. In the first place, granting the state the unlimited right to appeal against sentence through several tiers of appeal might well be unconstitutional. . . In *Olivier* this court recognised that what is set out in that dictum was the very foundation upon which the restriction of the state's right to appeal is founded.'[9]

The definition of 'appeal' in chapter 5 of the SC Act excludes appeals in matters 'regulated in terms of the Criminal Procedure Act'. *Kock* held that: 'The state's right of appeal is specifically regulated by the CPA, therefore the provisions of s 16(1)*(b)* do not find application.'[10] It concluded by saying:

'Having regard to the constitutional and policy imperatives dealt with earlier in this judgment, the question of a further right of appeal by the state in respect of sentence would have to be specifically dealt with in legislation that is clear and precise. As stated above, legislation to that effect might well be challengeable.

. . .

In light of what is set out above, it is in my view clear that in the present case the state has no further right to appeal to this court.' [11]

The matter was struck from the roll.

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[7] Superior Courts Act 10 of 2013.
[8] *DPP Western Cape v Kock* [2015] ZASCA 197; 2016 (1) SACR 539 (SCA).
[9] *Kock* para 9.
[10] *Kock* para 18. The reference to the CPA is to the Criminal Procedure Act 51 of 1977.
[11] *Kock* paras 19 & 20.

[5] There is only one feature which distinguishes this matter from *Kock*. That matter dealt with a further appeal by the State. Here, the sentence by the trial court was appealed by the respondent and not the State. The attempt by the State to appeal the resultant sentence is the first attempt of the State to appeal. There is thus no question of 'a *further* right of appeal by the state in respect of sentence' as was the case in *Kock*. (my emphasis)

[6] It is appropriate at this point to sketch the circumstances of the matter. It will be necessary to do so in some detail. At his trial, the respondent's plea explanation indicated that he had stabbed the deceased once in order to defend himself against an attack by the deceased. The incident took place at a car wash facility. The deceased, the respondent and the respondent's wife had all brought their vehicles to be washed. Two years prior to that, the respondent had caught his wife and the deceased *in flagrante delicto*. The respondent and his wife reconciled soon thereafter. No further liaison took place between her and the deceased. That was the last occasion on which the paths of the respondent and the deceased crossed.

[7] Two eyewitnesses testified for the State. Neither of them saw the entire episode. They first became aware of events when they saw the deceased fleeing out of the gate of the car wash facility with the respondent in hot pursuit. The respondent was holding a knife. The deceased was bleeding from his back. The deceased stumbled and fell, whereupon the respondent stabbed him once on his neck. At the time, the deceased was sitting on his buttocks with his right hand on the ground. The respondent then said that he would 'finish off' the deceased. The deceased stood up and continued fleeing. The respondent resumed his chase. The first State witness stopped him and escorted him back to the car wash premises. As he entered the gate, the respondent said to the bystanders

that they should not be surprised, since the deceased was having sexual intercourse with his wife. The respondent and his wife then left in their vehicles.

[8] The deceased was left bleeding profusely. The first State witness drove him to hospital where emergency surgery attempted to stem the flow of blood to no avail. Both the doctor who had treated the deceased and the doctor who had performed the post-mortem examination testified that the deceased sustained two stab wounds. The non-fatal wound was to his back. The fatal one was to the left-hand side of his neck.

[9] The version of the respondent was that he and his wife took their vehicles to the car wash. He removed items from his car, including a Swiss army pocket knife. When he went to pay, someone patted him on his back. When he turned around, the deceased struck him in his eye. He fell down with the deceased on top and assaulting him. He managed to dislodge the deceased enough to locate and open his pocket knife. He stabbed the deceased once, who then jumped up and ran away. The respondent pursued him. After they were outside the gate, the respondent gave up the chase. He was adamant that he had stabbed the deceased only once.

[10] He stated that he chased the deceased because he was angry at being hit without reason. He was not attempting to stab him again, even though he was chasing him with the knife in his hand. He denied having stabbed the deceased because the deceased had had an affair with his wife. He said that he decided not to kill him at that time, despite having had a firearm which he could have used for that purpose. He could not explain why the doctors both found that the deceased had sustained two stab wounds.

[11] The trial court accepted the evidence of the State witnesses and rejected that of the respondent where they conflicted. A crucial fact was the presence of two stab wounds on the body of the deceased. This tallied with the State evidence. The second aspect rejected by the trial court was that the deceased at no stage fell down while being chased. The third was the manner in which the respondent said that he had stabbed the deceased. This was inconsistent with the medical evidence of how the wounds were sustained. The trial court accepted that the non-fatal wound was administered in self-defence. Thereafter, however, the deceased had run away and the fatal blow was inflicted whilst the deceased was helpless and on the ground. At that stage, the deceased posed no threat to the respondent. The respondent denied the second, fatal, stabbing and thus did not say why he delivered it. The trial court held that the respondent had the direct intention to kill the deceased. None of these findings was attacked on appeal. Those factual findings are binding on an appeal court considering an appeal against sentence.[12]

[12] The trial court accepted that the respondent had been provoked by the attack on him by the deceased. When he was asked why he had chased the deceased, the respondent said: 'I was angry. I was furious that this man is hitting me without reason.' There was no finding, evidence or submission on behalf of the respondent that the provocation related to the adulterous affair between the deceased and the respondent's wife which had taken place two years prior to that. In particular, it could not be found that this was the reason the fatal stab wound was inflicted, since the respondent gave no reason for the fatal stabbing or evidence of his state of mind at the time.

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[12] *S v Hadebe* [1997] ZASCA 86; 1997 (2) SACR 641 (SCA) at 645*d-f*. This matter dealt with an appeal against conviction. Marais JA said: '[T]here are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.' This summarised the fuller reasoning in *R v Dhlumayo & another* 1948 (2) SA 677 (A) 705-706. The approach is even more applicable where the appeal is against sentence only.

[13] Despite this, the high court held that the respondent was 'acting in circumstances of extreme provocation'. It held that it was understandable, in the light of the adulterous affair, that 'when the deceased attacked him, the [respondent] should have lost his control over his emotions, and acted completely irrationally.' It further held that the fatal stabbing:

'occurred in the context of utmost and severest provocation by the deceased. It is not surprising and cannot be said to be unreasonable for the [respondent] to have acted in the manner he did. Society would in my view understand that he acted as he did in the face of unprecedented provocation.'

It went on to find that, in the circumstances, 'there is a reasonable possibility that he was not acting rationally when he stood up from the ground, chased the deceased to the point where he (the deceased) fell and upon catching up with him, fatally stabbed him.' It further said:

'[I]n my view even the community would accept that the [respondent] acted with diminished responsibility when he committed the crime. This is an important factor which the court below ought to have accorded sufficient recognition and weight in the consideration of sentencing but failed to do so.'

[14] Unfortunately, these observations are totally at odds with the specific factual findings of the trial court. They clearly cannot found the basis for a sentence on appeal. It was due to these erroneous views that the high court arrived at its sentence and set aside that imposed by the trial court. In my respectful view, this was not a proper basis on which to approach the matter. The wholly suspended sentence imposed by the high court is shocking in the circumstances. A serious injustice appears to have been done.

[15] Can *Kock* be construed to mean that, because this is the first appeal by the State against sentence, this court has jurisdiction to determine it? In the light of the clear reasoning in *Olivier*, *Nabolisa* and *Kock*, the answer is no. As I have indicated, policy considerations have been invoked for the narrow right of

appeal accorded to the State. No provision is made for the situation where, as a result of an appeal against sentence by a convicted person, the appeal court wildly errs in the opposite direction, leaving the State without a right to appeal. The situation in the present matter may well expose a lacuna in those provisions which might merit consideration by the legislature.

[16] When confronted with the insuperable difficulty of *Kock*, and which it conceded, the State attempted to call in aid the provisions of s 311 of the Act. The relevant part reads:

'(1) Where the provincial or local division on appeal, whether brought by the attorney-general or other prosecutor or the person convicted, gives a decision in favour of the person convicted on a question of law, the attorney-general or other prosecutor against whom the decision is given may appeal to the Appellate Division of the Supreme Court, which shall, if it decides the matter in issue in favour of the appellant, set aside or vary the decision appealed from . . .'.

In *DPP, Gauteng Division, Pretoria v Moabi*,[13] this court held that s 311 granted an automatic right of appeal and that no leave or special leave was required. But such an appeal lies only against a decision in favour of a convicted person on a question of law.

[17] The State sought to rely on the following passage in *Moabi*:

'It was held in *Magmoed v Van Rensburg* that the question, whether the proven facts bring the conduct of an accused person within the ambit of the crime charged, is one of law.'[14]

But this dealt with the situation where the appeal court based its approach to sentence on the incorrect section of the CLAA as a result of a finding on a question of law. This was summarised in the majority judgment:

'The High Court held that intent must be proved when establishing whether grievous bodily harm was inflicted. This was clearly wrong as is pointed out in [15] of the minority judgment.

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[13] *DPP, Gauteng Division, Pretoria v Moabi* [2017] ZASCA 85; 2017 (2) SACR 384 (SCA).
[14] *Moabi* para 12. References omitted.

This conclusion was accordingly a question of law wrongly decided in favour of the respondent.'[15]

[18] In this matter, the State submitted:

'[T]he finding of the [high court] that the Respondent acted with diminished criminal responsibility when he committed the crime is a decision in favour of a convicted person on a question of law as contemplated in section 311 of the Criminal Procedure Act.'

But a distinction must be drawn between diminished responsibility and lack of criminal capacity, although both involve findings of fact. In *S v Mnisi*,[16] Boruchowitz AJA said:

'The appellant does not seek to rely upon the defence of temporary non-pathological criminal incapacity but rather upon diminished responsibility which is not a defence but is relevant to the question of sentence. The former relates to a lack of criminal capacity arising from a non-pathological cause which is of a temporary nature whereas the latter presupposes criminal capacity but reduces culpability.'

Whether or not diminished criminal responsibility is present is a question of fact. If it is found to be present, it is a factor to be taken into account along with other factors bearing on sentence. If an incorrect factual finding is applied to the question of sentence, this simply amounts to a misdirection of the court doing so. It does not involve a decision in favour of the convicted person on a question of law. This was explained by Nugent JA in *Director of Public Prosecutions, Transvaal v Venter*:[17]

'We are not dealing in this case with a pathological condition that requires expert medical opinion to guide a court in reaching its conclusion. We are dealing with the weight to be attached to a set of factors that might have operated on the respondent's mind to diminish his culpability.'

[19] In *Director of Public Prosecutions, Gauteng v MG*,[18] this court held that:

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[15] *Moabi* para 26.
[16] *S v Mnisi* [2009] ZASCA 17; 2009 (2) SACR 227 (SCA) para 4.
[17] *Director Of Public Prosecutions, Transvaal v Venter* [2008] ZASCA 76; 2009 (1) SACR 165 (SCA) para 67.
[18] *Director of Public Prosecutions, Gauteng v MG* [2017] ZASCA 82; 2017 (2) SACR 132 (SCA) para 29.

'An exercise of a judicial discretion based on a wrong principle or erroneous view of the law is clearly a question of law decided in favour of a convicted person.'

It is the underlying legal principle which was misconceived in *Moabi*. The sentencing court wrongly based the sentence on the incorrect section of the Criminal Law Amendment Act. It did so because it incorrectly held that intention to cause grievous bodily harm must be present when all that the Act required was that grievous bodily harm had in fact been inflicted during a rape. The present matter is distinguishable. It is not a wrong legal principle to take into account diminished criminal responsibility when considering sentence, even if as a matter of fact, a case for diminished responsibility had not been made out. It is simply a misdirection on the facts.

[20] As I have said, the judgment of the high court on sentence is replete with serious misdirections. In those circumstances, the high court clearly erred in its approach to sentence. And the sentence it imposed is shockingly lenient. But that does not give this court jurisdiction under s 311 of the Act. I come to this conclusion with great reluctance in view of the facts of this matter. If this court had jurisdiction to entertain an appeal, there is little doubt that the respondent would have received a sentence of a lengthy term of direct imprisonment. I say this because, in case the court did have jurisdiction, full argument was heard on the merits. Since this court does not have jurisdiction to determine the appeal, the appropriate order is to strike the matter from the roll.

[21] In the result, the following order is made:

The appeal is struck from the roll.

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T R Gorven

Acting Judge of Appeal

Appearances

For the Appellant:	R Ndou
	Instructed by:
	The Director of Public Prosecutions, Johannesburg
	Webbers, Bloemfontein
For the Respondent	PJ Du Plessis
	Instructed by:
	BDK Attorneys, Johannesburg
	Symington & De Kok Attorneys, Bloemfontein